

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
The Cheyenne River Sioux Tribe)	
Telephone Authority's and US West)	CC Docket No. 98-6
Communications, Inc.'s Joint Petition for)	DA 98-145
Preemption Pursuant to Section 253 for)	
Expedited Ruling Preempting South Dakota)	
Law)	

COMMENTS
OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits these comments in response to the Commission's *Public Notice*, DA 98-145 released on January 28, 1998.

NTCA is a national association of 500 local exchange carriers ("LECs"). These LECs provide telecommunications services to end users and interexchange carriers throughout rural America. Cheyenne River Sioux Tribe Telephone Authority is a local exchange carrier and a member of NTCA. It has an outstanding reputation and has been providing quality services to its subscribers for decades.

DISCUSSION

The Cheyenne River Sioux Tribe Telephone Authority ("CRSTTA") has an agreement with US West Communications, Inc. ("US West") for the purchase of its Morristown, McIntosh and Timber Lake telephone exchanges located in South Dakota. Under South Dakota Codified

National Telephone Cooperative Association

No. of Copies rec'd 01/2
List ABCDE

February 27, 1998

Laws (“SDCL”) § 49-31-59, the South Dakota Public Utilities Commission (“SDPUC”) must approve the sale of telecommunications exchanges in the state and do so in separate votes for each transaction. The SDPUC considered CRSTTA’s application with that of twenty other buyers in a consortium that purchased 67 US West exchanges. In its separate vote, only CRSTTA’s application was denied on the ground that South Dakota does not collect taxes or exercise regulatory oversight over the CRSTTA. CRSTTA was established in 1974 by the Cheyenne River Sioux Tribe as a telephone authority.¹

CRSTTA seeks preemption of South Dakota laws as applied to it. NTCA agrees that South Dakota Codified Laws (“SDCL”) § 49-31-59 as applied to CRSTTA should be preempted because (1) it prevents the company from providing a telecommunications service, and (2) the state’s behavior does not accomplish any of the purposes permitted by Section 253 (b).

Section 253(a) of the Act² provides that a state statute or regulation may not impede the ability of any entity from offering telecommunications services to the public. Section 253(b) of the Act³ provides that a state may impose “competitively neutral basis” requirements that are necessary to protect the public’s safety.⁴ State or local requirements restricting entry must be related to the advancement of universal service goals, the public safety or measures that ensure

¹ Petition at 4.

² Id.

³ 47 USC §253(b).

⁴ Id.

quality of service and protection of the rights of consumers.⁵ A state's taxing or regulatory authority are not mentioned in the statute and South Dakota has not shown that its lack of authority to tax or regulate fulfills legitimate section 253 (b) goals. For example, the state's ability to promote universal service is unaffected by its inability to tax or its unwillingness to enter into tax compacts with the telephone authority or any other nontaxable entity desiring to offer telecommunications services. The state's refusal to approve the sale does not advance universal service in any way. It is undisputed that approval of the purchases will instead advance universal service. CRSTTA provides quality service and intends to improve the quality of service in purchased exchanges. The SDPUC designated CRSTTA an eligible carrier precisely because it is capable of providing the services included in the definition of universal service and supported by federal support mechanisms.

Similarly, the State's interest in exclusive jurisdiction or the lack thereof is not a valid consideration under Section 253 (b). Nothing in the Telecommunications Act of 1996 requires that any carrier desiring to provide services or to become an eligible carrier must be subject to the full panoply of state regulation. Indeed, the Act specifically provides that rate regulation of commercial mobile radio services are preempted. Yet these carriers may be designated eligible carriers and absolute prohibitions against their acquisition of wireline facilities or their provision of other telecommunications services based on the presence or absence of state regulation or indeed on their taxable status would surely be viewed as a barrier to entry.

One of the central tenets of the Telecommunications Act is the ability of carriers to have the choice of either being a facilities based provider of local telephone service or resellers. As

⁵ Id.

CRSTTA points out, if the SDPUC continues to utilize SDCL §49-31-59 to prevent it from acquiring facilities to operate as a facilities based carrier, it is likely to use the same reasoning to preclude the CRSTTA from providing resale of telephone service to consumers.⁶ The CRSTTA is at a severe disadvantage because it must either duplicate facilities in order to offer competing local telephone service or choose not to compete. CRSTTA points out that it is not economically feasible to duplicate facilities.⁷ The application of SDCL § 49-31-59 thus becomes an absolute bar to the provision of any kind of service by CRSTTA to these areas and indeed other areas in South Dakota as well.

CONCLUSION

For the reasons listed above, NTCA strongly supports CRSTTA's and US West's joint petition seeking federal preemption of SDCL § 49-31-59. The application of this law effectively prohibits the CRSTTA from being a viable local telecommunications competitor in most of the state of South Dakota. The Commission should preempt the state's action both because it is prohibited and to prevent the dangerous precedent that would allow states to dictate corporate organizational structure and exclude whole classes of companies that do not comply with the state's interest in taxing telecommunications entities or in regulating entities that or otherwise

⁶ Petition at 16.

⁷ Petition at 15.

subject to different jurisdictional authorities but nonetheless provide services in a manner that promote the goals of the Telecommunications Act and do not conflict with the state's legitimate interest in public safety or the rights of consumers.

Respectfully submitted,

NATIONAL TELEPHONE COOPERATIVE
ASSOCIATION

By: L. Marie Guillory ^{PR}
L. Marie Guillory


Its Attorney

2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 298-2359

February 27, 1998

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in CC Docket No. 98-6 was served on this 27th day of February 1998, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:


Gail C. Malloy

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W., Room 814-0101
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Michael Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832-0104
Washington, D.C. 20554

Commissioner Harold W. Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20036

Ms. Janice Myles
Policy and Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544-1600G
Washington, D.C. 20554

Scott B. McElroy, Esq.
Alice E. Walker, Esq.
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, No. 220
Boulder, Colorado 80302

William P. Heaston, Esq.
Laurie J. Bennett, Esq.
US West Communications, Inc.
1020 19th Street, N.W.
Washington, D.C. 20036